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No. 778

# In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 11,891

JOHN JOSEPH KAN,
*Petitioner,*

vs.

ERNEST TSANG,
*Respondent.*

## Respondent's Brief in Opposition to Petition for a Writ of Certiorari

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### THE PETITION IS NOT MERITORIOUS

**1. The State Courts Have Jurisdiction Unless Affirmatively Ousted by Statute; if Congress Intended the Federal Courts to Have Exclusive Jurisdiction It Would Have Said So; Having Not Done So, the Several Courts Have Concurrent Jurisdiction.**

The present question is whether the federal courts have exclusive jurisdiction, and the state courts have none, in the determination of *damages* claimed by a former member of the military services because of his ex-employer's fail-

ure to reemploy him as provided by the so-called "G. I. Bill of Rights." It is one that should be answerable by use of ordinary common sense without resort to extended legal analysis.

If Congress had intended to provide the jurisdiction to be exclusive, it easily could have said so. The very fact that it did not say so is the best proof that it did not intend the jurisdiction to be exclusive.

The statute goes no further than to say that the federal courts shall have jurisdiction, a proper stipulation because otherwise in the absence of diversity of citizenship, requisite minimum amount in controversy, etc., the federal courts might not have jurisdiction.

Of course, it is conceded a state court has general jurisdiction of actions for damages between citizens of said state. On the face of the statute, there is nothing *directly* withdrawing jurisdiction of causes arising under it from the state courts and nothing *inferentially* doing so.

The courts should proceed upon the basis that Congress has enough intelligence to say so, if it wants to provide for such exclusive jurisdiction; the courts should not try to fill in the unspoken words with vague speculations.

**2. The Department of Justice Recognizes the Lack of Merit to This Petition.**

This action in the District Court was filed for the ex-service man by the United States Attorney for the Northern District of California, conformable to the statute providing that the latter official shall act *gratis* in such cases. This representation extended to appearing for the present petitioner when he was appellee in the Court of Appeals for the Ninth District.

Our information is that after that court reversed the judgment, upon application of the United States Attorney to the Department of Justice for leave to pursue the matter to this court, the Attorney General of the United States recognized the correctness of the decision of the Court of Appeals and instructed the United States Attorney to proceed no further. This is rather evident from the fact that the petitioner, for the first time since the action was filed, is now appearing through private counsel.

### 3. The Attorneys Who Appeared for the Petitioner in the District Court Recognized That This Petition Has No Merit.

According to the Transcript of Record, particularly the Reporter's Transcript contained therein, on May 27, 1946, there was a pretrial of the employer's special defenses of res judicata and another action pending (T. of R. 36). We then showed to the District Court that the ex-service man had voluntarily selected the Superior Court of the State of California as his forum to claim damages from the employer on the ground that he had been refused reemployment; that regardless of the question of whether the state court's judgment was conclusive upon the federal court, its findings of fact were; that taking the facts as adjudicated by the state court, the federal court could not rationally grant any relief. Those facts included such findings as that the ex-employee had been offered the return of his same job, at the same rate of pay, same seniority, etc., and that he had refused to return to work (T. of R. 36-45).

Thereupon, the Assistant United States Attorney (Mr. Scholz) made his showing and in doing so called for a

statement by the attorney (Mr. Ames) who had appeared for the ex-employee in the state court action. They agreed that the state court's adjudication that the employee had sustained no damages would be res judicata against the federal court entertaining any claim of *damages*, but claimed a distinction in that the present action, to the contrary, was one for equitable relief in restoration of the man's job; that the federal court alone had jurisdiction of the latter phase (T. of R. 45-52).

The District Judge *abated* this action until the Supreme Court of the State of California could pass upon the appeal which the ex-employee had taken from the Superior Court judgment (T. of R. 52). Its order ultimately was filed, affirming the Superior Court. Meanwhile the employer-partnership terminated by expiry of the three-year period for which it was organized, so when the District Judge ordered that we proceed with the trial (without ever ruling on the issues of the pretrial), petitioner acknowledged that he was now asking for damages alone, without restitution of his job (T. of R. 72-76).

The fact remains, therefore, that this case went to trial upon a claim that petitioner's own attorneys already had agreed was barred by the previous state court action.

## STATEMENT OF THE CASE

To the petition's statement, we add:

### 1. It Is Not Necessary to Determine That the State Court Had Concurrent Jurisdiction to Determine the Legal Rights of an Ex-Service Man.

Both the state court action and this one were prosecuted for the identical relief, i.e., damages, and none other. The opinion of the District Court of Appeal, contained in the appendix, relates:

> "In the present case Kan does not seek reinstatement, but seeks damages from Tsang." (Appendix, p. 6)

It has been our position throughout this case, beginning with the pretrial referred to above, through to the briefs filed in the United States Court of Appeals, that it was not necessary to go so far as to determine that the state court's conclusions of law were binding on the federal court in respect to this, an action on a federal statute; that the state court having jurisdiction of the persons of its two citizens, competently determined certain facts; that those facts alone were inconsistent with and barred any relief sought by the petitioner, particularly damages. In other words, it having been finally adjudicated between these same parties that the employer had offered to return the employee to the same job, at the same place and at the same rate of pay, and also that the employee had refused to accept the same, could not be the predicate for any litigation anywhere of a claim by the employee that he had sustained damages by reason of the employer having refused him his job.

**2. Respondent's Defenses Were More Extensive Than Stated in the Petition for Certiorari.**

Not so perfunctory as stated in the petition, our defenses went much further. First and foremost, we have always contended that in truth and in fact the petitioner had no cause upon the merits. Regardless of the state courts having held the same thing, in reality we demonstrated again in this case that by his own testimony the employee admitted that he had been offered a return to the same job at the same rate of pay; that he insisted upon a raise in pay because of extraneous circumstances; also he took the position he would not return unless given a written contract for a three-year term, despite the fact that before his enlistment he was employed only on a month to month basis.

We also showed that the uncontraverted record disclosed that he had been the moving party for the judicial dissolution of the employer-partnership in another action in the state court; that therein the court had fixed a deadline for the filing of claims against the partnership; that this petitioner did file certain claims therein but none for this cause of action; that the partnership assets had been distributed and that it would be unconscionable for him to pursue his claim of damages against this respondent, who was the general partner, but from whom the assets had been taken in the dissolution proceedings.

We also reestablished (as indeed, the state court found) that the petitioner was not a fit and proper person to be reemployed; that he was insubordinate and even he did not deny that following his discharge from the army, he brought a gun into the place of business and threatened to shoot the respondent.

## PETITIONER'S ASSIGNMENT OF REASONS FOR GRANTING WRIT

In his petition (page 6), petitioner assigns two reasons why this court should grant the writ, viz.:

### 1. Alleged Conflict of Decision Between Circuits.

In this connection, petitioner refers to but one other case, the decision of the Sixth Circuit in *Trailmobile v. Whirls,* 154 Fed.2d 866. Even a cursory reading of that opinion discloses that it does not hold as contended for by petitioner and is not in any wise in conflict with the opinion filed in this case. What it did hold was that Whirls was not bound by a previous class suit filed by one Hess. (To the contrary, the present case involves two actions between the identical persons.) The *Trailmobile* case is so patently inapplicable that despite the fact that it was assertedly *followed* by the District Court (petition, page 5), it was not considered worthy of mention in either of the two opinions filed by the Court of Appeals!

### 2. That the State Court Erroneously Interpreted the Petitioner's Rights.

We have attached a copy of the opinion of the state appellate court to demonstrate the utter incorrectness of petitioner's assertion. Kan and Tsang were receiving $500 per month each as co-managers before the war. When Kan left, Tsang was raised to $750 because he was doing the work of two. When Kan returned he was offered $500, but wanted $750 because that was what Tsang had been receiving meanwhile. Kan did not claim he was entitled to it except he had an unofficial understanding that *in perpetuum* he always was to get the same amount as Tsang. The state

court held there was no such understanding. It also held that Kan had refused the proffered reemployment until he could exact a three-year, written contract and that there was no basis for the employer being required to give him such, he not having had any contract at all before he enlisted.

Be that as it may, it was not any "interpretation" of petitioner's *rights* under the federal statute that was binding on the federal court. The Court of Appeals, this petition to the contrary, never did so hold. The state court tried the same issues of facts and found that the job was offered, that petitioner refused the same, that he had no contract with any escalator clause providing he should receive any particular raises along with Tsang, that he sustained no damages. Those findings of *fact* are res judicata against any other court ever holding to the contrary.

Without finding the facts to be contrary to what they were found to be by the state court, no court could sensibly allow any damages to this petitioner.

## CONCLUSION

In summary it is our position:

1. The opinion of the United States Court of Appeals is correct in holding that the federal court does not have exclusive jurisdiction, to the exclusion of the state courts, to determine a claim of damages arising out of an alleged failure to restore an ex-service man to his former position;

2. It is not necessary to the present case to determine whether that holding is correct, inasmuch as it is con-

ceded that the state court did have the right to make a determination of the facts which it did adjudicate, and those facts are binding upon the federal court; that the facts so found preclude the granting of any relief to this petitioner;

3. From his own testimony and evidence, petitioner never had a cause of action with any merits and is entitled to no relief whatsoever.

Dated: San Francisco, June 6, 1949.

ROBERT E. HATCH
*Attorney for Respondent*

LEMUEL H. MATTHEWS
*Of Counsel*
*for Respondent*

**(Appendix follows)**

## APPENDIX A

*In the District Court of Appeal*
*State of California*
*First Appellate District*

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DIVISION ONE

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1 Civil No. 13,241

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Ernest Tsang,
Plaintiff and Respondent,
vs.
John Kan,
Defendant and Appellant.

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### OPINION

This is an appeal by defendant and cross-complainant, John Kan, from a judgment and decree in an action for declaratory relief in which the trial court adjudicated that he is a limited partner in a certain restaurant business to the extent of 1,000/9,700 and has no right to be employed by the corporation originally operating said business; its successor, a partnership, or the plaintiff, Ernest Tsang, the general partner and manager of the partnership. For convenience, the plaintiff and cross-defendant will be referred to as Tsang, and the defendant and cross-complainant as Kan.

On September 28, 1939, a restaurant business was incorporated under the laws of the State of California

as the Cathay House, Inc. Kan and one Dr. Lee are the originators of the enterprise. Stock in the corporation was sold to a number of Chinese, including Tsang, who ultimately paid in about $5,500 of the $9,700 paid in capital. George Chew was the next largest stockholder, having paid $1,500. Kan and his wife together contributed only $1,100. Tsang became president of the corporation and Kan was made secretary. They received salaries of $300 a month, which were increased to $500 a month. In 1941, Kan ceased to be secretary of the corporation and continued as a director. On July 23, 1943, he enlisted in the armed forces of the United States and left San Francisco immediately. October 1, 1943, a limited partnership was created with Tsang as general partner and the other stockholders, including Kan and his wife, as limited partners—it being arranged that the partnership percentages as established in the articles of copartnership were the same as the percentages of ownership of stock in the corporation. Kan's wife signed her husband's name to the certificate of limited partnership upon the advice of Kan's attorney. Tsang secured a written contract of employment from the partnership for $750 a month commencing October 1, 1943, for the duration of the agreement of limited partnership. The minutes of the corporation reveal that the corporation assets were transferred to the limited partnership. The corporation was not dissolved. Kan was honorably discharged November 26, 1943.

October 21, 1944, Tsang filed a complaint for declaratory relief alleging that Kan made claims that Tsang individually and/or as president and general manager of the corporation and/or as general partner was obligated to employ Kan at Cathay House, and praying for a judg-

ment and decree declaring and determining the rights and duties of the parties. Kan's answer admitted that there was a controversy between the parties and referred to his cross-complaint for the particulars of his claims. The first cause of action pleaded in the cross-complaint alleged that before Kan enlisted, Tsang agreed that upon Kan's return Kan should be restored to the position of comanager of Cathay House on an equal basis with Tsang, and that since Tsang's salary was increased to $750 a month, he was entitled to be employed at $750 a month by virtue of the Selective Training and Service Act of 1940, as amended (50 U.S.C.A. App. §§301 et seq.), but that Tsang refused to employ him either at $750 or $500 a month; he alleged that he suffered damages in the sum of $750 per month for twelve months to the date of the filing of the cross-complaint or a total of $9,000, less what he has been able to earn, namely, $1,130, or an actual damage of $7,870.

The second cause of action pleaded in the cross-complaint alleged that Tsang deliberately promised to take Kan back after his return from military service, without any intention of performing such promise; that Tsang caused the corporation's business to be transferred to a limited partnership with himself as sole general partner, knowing that a limited partner could not be employed in the partnership without changing the relationship of the partners, which Tsang had no intention of permitting; that Tsang compelled Kan's wife, by duress and threats of injury to the interests of her husband, to sign her husband's name to a certificate of limited partnership, and that Kan suffered general damages in the sum of $25,000 by reason of Tsang's fraud in depriving Kan of his employment.

The trial court found that when Kan went into the Army he was getting $500 a month with no agreement, oral or written, for the continuation of his employment or for receiving a different rate of compensation in the future, and that within three months of his return he was offered the same position on the same basis, but he refused to accept the same and never offered nor was willing to return to said position. The trial court evidently believed Tsang's testimony, a portion of which follows: "Q. * * * did Mr. Kan discuss with you the possibility or desirability of his returning to the Cathay House? A. He did. Q. And did you tell him one way or the other whether he would be acceptable as an employee? A. I did, on numerous occasions. Q. And what did you tell him in that regard? A. I told him that the position that he occupied formerly, at the same rate of salary, was open to him. * * * As I recall it was the first day of Mr. Kan's return to San Francisco after his discharge. I was very surprised to see him that day. He came into the Cathay House—I had no knowledge that he was coming in or was on furlough, or discharged. He came in to me, and he said, 'How about a job.' I said, 'O. K. Come back to work.' He said he first would like a vacation of about two weeks, to which I agreed. On or about December 15th, 1943, Mr. Kan and I had lunch * * * where he and I discussed—no one else was present—his return to the Cathay House. I informed him his position was open at $500 a month. He stated that he wanted $750 a month. I informed him that I had no power to give him $750 a month, and that my salary at that rate was set by the stockholders; but I felt I could offer him his $500 a month and I informed him if he insisted upon

$750 a month I would have to consult the other stockholders, or one of the majority stockholders of the firm, which was Mr. George Chew. So we agreed to talk it over later, pending any conversation we might have had with Mr. George Chew concerning the matter. Mr. Kan came back to see me several days later and asked me if I had seen Mr. Chew, and I had not, because Mr. Chew was out of town. So I asked Mr. Kan, why don't you go down and see Mr. Chew. He might be back. He went down to see Mr. Chew, and came back about three-quarters of an hour later and asked me what this was all about, was I trying to give him a run-around, or what. I said, what did Mr. Chew say? And Mr. Kan informed me Mr. Chew did not agree to give him $750 a month, but was agreeable to him coming back to work at his former salary."

That Kan refused to return to his "same position on the same basis," is further seen in the testimony of Tsang's attorney to the effect that Kan refused to return to the Cathay House without a written contract covering several years' employment, although he had never had such a contract before he left to serve in the Army.

If the parties had entered into a contract under the terms of which Tsang was bound to take Kan back as comanager after Kan returned from the Army, Kan would be entitled to enforce such contract. Since the trial court found that Tsang offered to take Kan back, Tsang cannot be held to have breached any such contract. The question then arises, do the provisions of the Selective Training and Service Act of 1940 aid Kan?

Kan presents certain citations to the effect that the Selective Training and Service Act is to be construed liberally; that every consideration should be given to a

serviceman; that employees often include those in superior positions. It is not necessary to lengthen this opinion by commenting upon each of the cited cases. The reemployment provisions of the act, which are relied upon by Kan, are designed to enable a serviceman to be restored to the position he held before entering the armed forces. In the present case Kan does not seek reinstatement, but seeks damages from Tsang.

Kan contends that Tsang's terms that Kan sign a release, sign over his stock in Cathay House to his wife, and come back as an employee, violated the Selective Training and Service Act. The trial court's finding that Tsang offered to restore Kan to his same position indicates that the trial court considered that these "terms" did not alter the position which Kan had held before his enlistment. As to the matter of a release, Tsang's attorney testified that at a meeting held in his office shortly before this action was commenced he said "I thought it would be well for us to have some sort of a document—let's call it a mutual release, where John (Kan) agrees that he starts from scratch. * * * I have had experience in somewhat similar matters in the past, where after the lapse of time that people begin to imagine they have rights which they never thought they did before, so I said, 'Mr. Kan, have you any claims against Mr. Tsang of any kind —do you claim that you have got any right, any contract, or are there any agreements that have not been mentioned;' and he said absolutely none. I asked the same question of Mr. Tsang, and he gave the same answer." Such being the situation, the "release" had nothing to do with the Selective Training and Service Act or any rights

Kan might have had thereunder. Tsang's request that Kan sign over his stock to his wife was evidently the result of *his* conception of the law of limited partnerships —that a limited partner could not manage. The last requirement was explained to Kan by Tsang's attorney as follows: "* * * you understand that if you are taken back that you will be an employee * * * and if your services are not satisfactory * * * the employer has the right to terminate your employment." The trial court found that during the time that Kan was an officer and employee of Cathay House, Inc., his terms of office and employment were at the pleasure of the board of directors.

The trial court's finding that "Within three months following [date of discharge] plaintiff [Tsang] and said partnership offered to immediately restore defendant [Kan] to the same position which he had with the corporation * * * but defendant refused to accept the same," being supportted by evidence, justifies an affirmance of the judgment against Kan on the first count of his cross-complaint.

The trial court found against Kan on the second count of his cross-complaint. Specific findings were made that Kan had consented to the formation of the partnership and that it was not true that Tsang had no intention of permitting Kan to participate in the partnership. These findings are not challenged.

Kan urges that the evidence supported the allegation that Tsang promised to take Kan back after his return from militaryy service without any intention of performing such promisee, and hence that recovery should have been granted on the second count. Kan relies upon Civil Code,

section 1572, subdivision 4, which describes fraud as "A promise made without any intention of performing it," within the meaning of the chapter in which that section appears. Said chapter relates to the freedom of consent of the parties to a contract. (*Harlow v. American Equitable Assur. Co.*, 87 Cal. App. 28, 32 [261 P. 499].) Such fraud may be the basis of defense to a suit on an executory contract and it may also be the basis of an action for rescission of a contract. (*Wilson v. Rigali & Veselich*, 138 Cal. App. 760, 765 [33 P.2d 455].)

In the present action Kan seeks to recover damages for what is described in the Civil Code as "fraudulent deceit." The controlling sections are section 1709, which provides that "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers," and section 1710, which provides that a deceit within the meaning of the foregoing section is "4. A promise, made without any intention of performing it." The element of damage must be established to recover under these provisions. (*Munson v. Fishburn*, 183 Cal. 206, 220 [190 P. 808]; *Gerini v. Pacific Employers Ins. Co.*, 27 Cal. App. 2d 52 [80 P.2d 499].) In the language of *Barron Estate Co. v. Woodruff Co.*, 163 Cal. 561, 571 [126 P. 351, 42 L.R.A.N.S. 125], "It is fundamental, of course, that no matter what the nature of the fraud or deceit, unless detriment has been occasioned thereby, plaintiff has no cause of action." Assuming that at the time of Kan's enlistment Tsang promised to take Kan back without intending to do so, it is difficult to see that Kan was damaged thereby. It nowhere appears that Kan joined the Army because of

any such promise. Kan had made up his mind to enlist before he ever spoke to Tsang about it.

The allegation that Tsang compelled Kan's wife, by duress and threats of injury to the interests of her husband, to sign her husband's name to a certificate of limited partnership, is totally unsupported by the evidence. On the contrary, the evidence establishes that she acted upon the advice of Kan's attorney.

The judgment and decree is affirmed.

WARD, J.

Peters, P. J., and Bray, J., concurred.

Filed February 27, 1947.

Walter S. Chisholm, Clerk.

Appellant's petition for a hearing by the Supreme Court was denied April 28, 1947.

(Reported 78 Cal. App. 2d 275, 177 Pac. 2d 630.)